

KENTUCKY LABOR CABINET
OCCUPATIONAL SAFETY AND HEALTH PROGRAM
FIELD OPERATIONS MANUAL
CHAPTER 16 ACCESS TO MEDICAL RECORDS

CHAPTER XVI

ACCESS TO MEDICAL RECORDS

A. Procedures Concerning Program Access to Employee Medical Records.

1. General Policy. Program access to employee medical records will in certain circumstances be important to the agency's performance of its statutory functions. Medical records, however, contain personal details concerning the lives of employees. Due to the substantial personal privacy interests involved, Program authority to gain access to personally identifiable employee medical information will be exercised only after the agency has made a careful determination of its need for this information, and only with appropriate safeguards to protect individual privacy. Once this information is obtained, Program examination and use of it will be limited to only that information needed to accomplish the purpose for access. Personally identifiable employee information will be retained by the Kentucky Program only for so long as needed to accomplish the purpose for access, will be kept secure while being used, and will not be disclosed to other agencies or members of the public except in narrowly defined circumstances. This section establishes procedures to implement these policies.

2. Scope and Application.

- a. Except as provided in paragraphs (2)(c)-(2)(f) below, this section applies to all requests by Program personnel to obtain access to records in order to examine or copy personally identifiable employee medical information, whether or not pursuant to the access provision of 29 CFR 1910.20(e).
- b. For the purposes of this section, "personally identifiable employee medical information" means employee medical information accompanied by either direct identifiers (name, address, social security number, payroll number, etc.) or by information which could reasonably be used in the particular circumstances indirectly specific employees (e.g. exact age, height, weight, race, sex, date of initial employment, job title, etc.).
- c. This section does not apply to Program access to, or the use of, aggregate employee medical information or medical records on individual employees which is not a personally identifiable form. This section does not apply to records required by 803 KAR 2:180, to death certificates, or to employee exposure records,

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including biological monitoring records treated by 29 CFR 1910.20(c)(5) or by specific occupational safety and health standards as exposure records.

- d. This section does not apply where Program consultants or compliance personnel conduct an examination of employee medical records solely to verify employer compliance with medical surveillance recordkeeping requirements of an occupational safety and health standard, or with 29 CFR 1910.20. An examination of this nature shall be conducted on-site and, if requested, shall be conducted under observation of the recordholder. The consultant or compliance personnel shall not record and take off-site any information from medical records other than documentation necessary to determine compliance or noncompliance.
- e. This section does not apply to agency access to, or the use of, personally identifiable employee medical information obtained in the course of litigation.
- f. This section does not apply where a written directive by the Commissioner authorizes appropriately qualified personnel to conduct limited reviews of specific medical information mandated by an occupational safety and health standard, or of specific biological monitoring test results.
- g. Even if not covered by the terms of this section, all medically related information reported in a personally identifiable form shall be handled with appropriate discretion and care befitting all information concerning specific employees. There may, for example, be personal privacy interests involved with militate against disclosure of this kind of information to the public.

B. Responsible Persons

1. Commissioner of Workplace Standards. Commissioner of Workplace Standards shall be responsible for the overall administration and implementation of the procedures contained in this section, including making final Program determinations concerning:
 - a. Access to personally identifiable employee medical information (paragraph B.); and
 - b. Inter-agency transfer or public disclosure of personally identifiable employee medical information (paragraph K.).
2. Program Medical Records Officer. The commissioner of Workplace Standards shall designate a Program official

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with experience or training in the evaluation, use, and privacy protection of medical records to be the Program Medical Records Officer. The Program Medical Records Officer shall report directly to the Commissioner of Workplace Standards on matters concerning this section and shall be responsible for:

- a. Making recommendations to the Commissioner of Workplace Standards as to the approval or denial of written access orders (paragraph B.);.
 - b. Assuring that written access orders meet the requirements of paragraphs B.2 and B.3 of this section;
 - c. Responding to employee, collective bargaining agent, and employer objections concerning written access orders (paragraph D.);
 - d. Regulating the use of direct personal identifiers (paragraph E.);
 - e. Regulating internal agency use and security of personally identifiable employee medical information (paragraphs F.-H.);
 - f. Assuring that the results of agency analysis of personally identifiable medical information are, where appropriate, communicated to employees (paragraph I.);
 - g. Preparing an annual report of Program experience under this section (paragraph J.);
 - h. Assuring that advance notice is given of intended inter-agency transfers or public disclosures (paragraph K.);
3. Principal Program Investigator. The Principal Program Investigator shall be the Program employee in each instance of access to personally identifiable employee medical information who is made primarily responsible for assuring that the examination and use of this information is performed in the manner prescribed by a written access order and the requirements of this section (paragraphs B.-K.). When access is pursuant of a written access order, the Principal Program Investigator shall be professionally trained in medicine, public health, or allied fields (epidemiology, toxicology, industrial hygiene, biostatistics, environmental health, etc.).

C. Written Access Orders

1. Requirement for Written Access Order. Except as provided in paragraph B.4. below, each request by a Program

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representative to examine or copy personally identifiable employee medical information contained in a record held by an employer or other recordholder shall be made pursuant to a written access order which has been approved by the Commissioner of Workplace Standards upon the recommendation of the Program Medical Records Officer. If deemed appropriate, a written access order may constitute, or be accompanied by an administrative subpoena.

2. Approval Criteria for Written Access Order. Before approving a written access order, and the Program Medical Records Officer shall determine that:
 - a. The medical information to be examined or copied is relevant to a statutory purpose and there is a need to gain access to this personally identifiable information;
 - b. The personally identifiable medical information to be examined or copied is limited to only that information needed to accomplish the purpose for access; and
 - c. The personnel authorized to review and analyze the personally identifiable medical information is limited to those who have a need for access and have appropriate professional qualifications.
3. Content of Written Access Order. Each written access order shall state with reasonable particularity:
 - a. The statutory purposes for which access is sought;
 - b. A general description of the kind of employee medical information that will be examined and why there is a need to examine personally identifiable information;
 - c. Whether medical information will be examined on-site, and what type of information will be copied and removed off-site;
 - d. The name, address, and phone number of the Principal Program Investigator and the names of any other authorized persons who are expected to review and analyze the medical information;
 - e. The name, address, and phone number of the Program Medical Records Officer; and
 - f. The anticipated period of time during which the Program expects to retain the employee medical information in a personally identifiable form.

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4. Special Situations. Written access orders need not be obtained to examine or copy personally identifiable employee medical information under the following circumstances:

- a. Specific written consent. If the specific written consent of an employee is obtained pursuant to 29 CFR 1910.(20)(e)(2)(ii), and the agency or an agency employee is listed on the authorization as the designated representative to receive the medical information, then a written access order need not be obtained. Whenever personally identifiable employee medical information is obtained through specific written consent and taken off-site, a Principal Program Investigator shall be promptly named to assure protection of the information, and the Program Medical Records Officer shall be notified of this person's identity. The personally identifiable medical information obtained shall thereafter be subject to the use and security requirements of paragraphs F.-K. of this section.
- b. Physician consultations. A written access order need not be obtained where a Program staff or contract physician consults with an employer's physician concerning an occupational safety or health issue. In a situation of this nature, the Program physician may conduct on-site evaluation of employee medical records in consultation with the employer's physician, and may make necessary personal notes of his or her findings. No employee medical records, however, shall be taken off-site in the absence of a written consent of an employee, and no notes of personally identifiable employee medical information made by the Program physician shall leave his or her control without the permission of the Program medical Records Officer.

D. Presentation of Written Access Order and Notice to Employees

- 1. The Principal Investigator, or someone under his or her supervision, shall present at least two (2) copies each of the written access order and an accompanying cover letter to the employer prior to examining or obtaining medical information subject to a written access order. At least one copy of the written access order shall not identify specific employees by direct personal identifier. The accompanying cover letter shall summarize the requirements of this section and indicate that questions or objections concerning the written access order may be directed to the Principal Program Investigator or to the Medical Records Officer.
- 2. The Principal Program Investigator shall promptly present a copy of the written access order (which does not

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identify specific employees by direct personal identifier) and its accompanying cover letter to each collective bargaining agent representing employees whose medical records are subject to the written access order.

3. The Principal Program Investigator shall indicate that the employer must promptly post a copy of the written access order which does not identify specific employees by direct personal identifier, as well as post its accompanying cover letter (see 29 CFR 1910.20(e)(3)(ii)).
4. The Principal Program Investigator shall discuss with any collective bargaining agent and with the employer the appropriateness of individual notice to employees affected by the written access order. Where it is agreed that individual notice is appropriate, the Principal Program Investigator shall promptly provide to the employer an adequate number of copies of the written access order (which does not identify specific employees by direct personal identifier) and its accompanying cover letter to enable the employer either to individually notify each employee or to place a copy in each employee's medical file.

E. Objections Concerning a Written Access Order

1. All employee, collective bargaining agent, and employer written objections concerning access to records pursuant to a written access order shall be transmitted to the Program Medical Records Officer. Unless the agency decides otherwise, access to the records shall proceed without delay notwithstanding the lodging of an objection. The Program Medical Records Officer shall respond in writing to each employee's and collective bargaining agent's written objection to Program access. Where appropriate, the Program Medical Records Officer may revoke a written access order and direct that any medical information obtained by it be returned to the original recordholder or destroyed. The Principal Program Investigator shall assure that such instructions by the Program Medical Records Officer are promptly implemented.

F. Removal of Direct Personal Identifiers

1. Whenever employee medical information obtained pursuant to a written access order is taken off-site with direct personal identifiers included, the Principal Program Investigator shall, unless otherwise authorized by the Program Medical Records Officer, promptly separate all direct personal identifiers from the medical information, and code the medical information and the list of direct identifiers with a unique identifying number for each employee. The medical information with its numerical code shall thereafter be used and kept secured as though still

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in a directly identifiable form. The Principal Program Investigator shall hand-deliver or mail the list of direct personal identifiers with their corresponding numerical codes to the Program Medical Records Officer. The Program Medical Records Officer shall thereafter limit the use and distribution of the list of coded identifiers to those with a need to know its contents.

G. Internal Agency Use of Personally Identifiable Employee Medical Information

1. The Principal Program Investigator shall, in each instance of access, be primarily responsible for assuring that personally identifiable employee medical information is used and kept secured in accordance with this section.
2. The Principal Program Investigator, the Program Medical Records Officer, and any other authorized person listed on a written access order may permit the examination or use of personally identifiable employee medical information by agency employees and contractors who have a need for access, and appropriate qualifications for the purpose for which they are using the information. No Program employee or contractor is authorized to examine or otherwise use personally identifiable employee medical information unless so permitted.
3. Where a need exists, access to personally identifiable employee medical information may be provided to departmental attorneys and to agency contractors who are physicians or who have contractually agreed to abide by the requirements of this section and implementing agency directives and instructions.
4. Program employees and contractors are only authorized to use personally identifiable employee medical information for the purposes for which it was obtained, unless the specific written consent of an employee is obtained as to a secondary purpose, or the procedures of paragraph B.-E. of this section are repeated with respect to the secondary purpose.
5. Whenever practicable, the examination of personally identifiable employee medical information shall be performed on-site with a minimum of medical information taken off-site in a personally identifiable form.

H. Security Procedures

1. Agency files containing personally identifiable employee medical information shall be segregated from other agency files. When not in active use, files containing this information shall be kept in a locked cabinet or vault.

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2. The Program Medical Records Officer and the Principal Program Investigator shall each maintain a log of uses and transfers of personally identifiable employee medical information and lists of coded direct personal identifiers, except as to necessary uses by staff under their direct personal supervision.
3. The photocopying or other duplication of personally identifiable employee medical information shall be kept to the minimum necessary to accomplish the purposes for which the information was obtained.
4. The protective measures established by this section apply to all worksheets, duplicate copies, or other agency documents containing personally identifiable employee medical information.
5. Inter-agency transfer of personally identifiable employee medical information shall be by hand-delivery, United States mail or equally protective means. Inter-office mailing channel shall not be used.

I. Retention and Destruction of Records

1. Consistent with program records disposition programs, personally identifiable employee medical information and lists of coded direct personal identifiers shall be destroyed or returned to the original recordholder when no longer needed for the purposes for which they were obtained.
2. Personally identifiable employee medical information which is currently not being used actively but may be needed for future use shall be transferred to the Program Medical Records Officer. The Program Medical Records Officer shall conduct an annual review of all centrally-held information to determine which information is no longer needed for the purposes for which it was obtained.

J. Results of Agency Analysis Using Personally Identifiable Employee Medical Information.

1. The Program Medical Records Officer shall, as appropriate, assure that the results of an agency analysis using personally identifiable employee medical information are communicated to the employees whose personal medical information was used as a part of the analysis.

K. Annual Report

1. The Program Medical Records Officer shall on an annual basis review the Program's experience under this section during the previous year, and prepare a report to the Commissioner of Workplace Standards which shall be made

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available to the public. This report shall discuss:

- a. The number of written access orders approved and a summary of the purposes for access;
- b. The nature and disposition of employee, collective bargaining agent, and employer written objections concerning Program access to personally identifiable employee medical information; and
- c. The nature and disposition of requests for inter-agency transfer or public disclosure of personally identifiable employee medical information.

L. Inter-agency Transfer and Public Disclosure

1. Personally identifiable employee medical information shall not be transferred to another agency or office outside of the Program (other than to the General Counsel's Office) or disclosed to the public (other than to the affected employee or the original recordholder) except when required by law or when approved by the Secretary of Labor.
2. Except as provided in paragraph K.3 below, the Secretary shall not approve a request for an inter-agency transfer of personally identifiable employee medical information, which has not been consented to by the affected employees, unless the request is by a public agency which:
 - a. Needs the requested information in a personally identifiable form for a substantial public health purpose;
 - b. Will not use the requested information to make individual determinations concerning affected employees which could be to their detriment;
 - c. Has regulations or established written procedures providing protection for personally identifiable medical information substantially equivalent to that of this section; and
 - d. Satisfies an exemption to the Privacy Act to the extent that the Privacy Act applies to the requested information.
3. Upon the approval of the Secretary, personally identifiable employee medical information may be transferred to:
 - a. The National Institute for Occupational Safety and Health (NIOSH); and
 - b. The Department of Justice when necessary with respect

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to a specific action under KRS 338.

4. The Secretary shall not approve a request for public disclosure of employee medical information containing direct personal identifiers unless there are compelling circumstances affecting the safety and health of an individual.
5. The Secretary shall not approve requests for public disclosure of employee medical information unless authorized under 200 KAR 1:020.
6. Except as to the inter-agency transfer to NIOSH or the Department of Justice, the Program Medical Records Officer shall assure that advance notice is provided to any collective bargaining agent representing affected employees and to the employer on each occasion that the Kentucky Program intends to either transfer personally identifiable employee medical information to another agency or disclose it to a member of the public other than to an affected employee. When feasible, the Program Medical Records Officer shall take reasonable steps to assure that advance notice is provided to affected employees when the employee medical information to be transferred or disclosed contains direct personal identifiers.

M. Authorization of Review of Medical Opinions.

1. The preceding paragraphs, do not apply where a written directive by the Secretary authorizes appropriately qualified personnel to conduct limited reviews of specific medical information mandated by an occupational safety and health standard or of specific biological monitoring test results.
2. This section authorizes the examination of the content of and, if appropriate, copying of physician-written medical opinions mandated by the following standards as adopted by 803 Kar 2:020:
 - a. Respiratory Protection, 1910.134(b)(10);
 - b. Vinyl Chloride, 1910.1017(k)(4);
 - c. Inorganic Arsenic, 1910.1018(n)(6)(i);
 - d. Lead, 1910.1025(j)(3)(v) and (k)(1)(ii);
 - e. Coke Oven Emissions, 1910.1029(j)(5);
 - f. Cotton Dust, 1910.1043(h)(5);
 - g. 1,2-Dibromo-3-chloropropane (DBCP), 1910.1044(m)(5);

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- h. Acrylonitrile, 1910.1045(n)(6); and
- i. Cotton Dust in Cotton Gins, 1910.1046(e)(6).

NOTE: the "medical opinion" is that information the employer is required to obtain pursuant to the specific provision cited above for these standards.

- 3. Qualified Program Personnel. Review of the content of any medical information obtained or maintained pursuant to the standards specified above, which is in personally identifiable form shall be limited to Program Field-Qualified Industrial Hygienists or professionals with training in medical disciplines.
- 4. Need to Gain Access. The need to gain access in specific circumstances could be indicated by the following consideration:
 - a. Access to medical opinions could serve to determine whether an employer failed to take necessary corrective action recommended by a physician, or to inform employees of the recommended action required by the standards.
 - b. Review of the content of employee medical opinions could be relevant to the type of enforcement action the program may initiate against an employer, or can serve as proof of the appropriateness of an enforcement action or in the case of a consultative survey could be relevant to the advise and or recommendation which will be provided to the requesting employer.
 - c. Medical opinions could be highly relevant to imminent danger situations. Medical opinions could demonstrate that a particular employee, in light of that employee's current health status, faces an imminent danger of morbidity or death from present working conditions.
 - d. Access to medical opinions may be necessary to identify problem areas for physicians or other qualified Program personnel to review.
- 5. Limitations.
 - a. Before obtaining access to the medical information described in paragraph L.2. above, it must be determined that there is a need to gain access for Program enforcement or voluntary compliance purposes. Access to this medical information for purposes other than for the limited enforcement and voluntary compliance needs as illustrated above will require a

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written access order (paragraph B. of this chapter) unless:

- (1) Specific written consent of an employee is obtained pursuant to 1910.20(e)(2)(II) as adopted by 803 KAR 2:020 and the Program or a Program employee is listed on the authorization as the designated representative to receive the medical information.
 - (2) A Program staff or contract physician consults with an employer's physician pursuant to paragraph B.4.b of this chapter.
- b. Access to this medical information shall, if practicable, involve on-site review. A minimum of personally identifiable information shall be recorded and taken off-site.
6. Security Procedures. Whenever personally identifiable employee medical information is obtained pursuant to this chapter and taken off-site the Director shall:
- a. Promptly name Principal Program investigator to assure protection of this information.
 - b. Assure that the personally identifiable medical information obtained shall therefore be subject to the use and security requirements of paragraphs F through H of this chapter.

N. Authorization of Review of Specific Medical Information.

1. The preceding paragraphs do not apply where a written directive by the Commissioner authorizes appropriately qualified personnel to conduct limited reviews of specific medical information mandated by an Occupational Safety and Health standard or of specific biological monitoring test results.
2. This section authorizes appropriately qualified field personnel to conduct reviews of the test named in the following paragraph Section M.4. where the Director of Compliance determines that there is a need to gain access for enforcement purposes.
 - a. This authorization applies where the tests are part of medical surveillance programs mandated by standards; or where a laboratory test is not mandated by a standard is:
 - (1) A recognized indicator of a worker's past and/or potential exposure to a toxic substance or harmful physical agent which is known to be present or is likely to be present (e.g.,

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hippuric acid found in the urine due to exposure to toluene); or

- (2) A recognized indicator of an adverse health effect of that substance or agent (e.g., pulmonary function testing of workers exposed to silica).
- b. For the purpose of this chapter, "employee medical record" means any record concerning a current or former employee's health as it pertains to the laboratory tests specified in (d) of this instruction, and which is made or maintained by a physician, nurse, technician, or other health care personnel. This includes:
 - (1) The results of the laboratory tests; and
 - (2) Control, certification, and standardization data used for the laboratory determinations and findings.
- 3. Statutory Purpose. The purpose of obtaining access to this medical information is to assure safe and healthful working conditions for working men and women by providing an effective enforcement program for Kentucky OSH standards and Kentucky Occupational Safety and Health statutes under KRS 338.
- 4. Specific Medical Information. This section authorizes the examination of the content of and, if appropriate, the copying of employee medical records pertaining to the following:
 - a. Pulmonary function tests.
 - b. Audiograms.
 - c. Blood Urea Nitrogen (BUN).
 - d. Serum creatinine.
 - e. Complete blood count with differential and description of peripheral smear.
 - f. Serum electrolytes.
 - g. Serum calcium.
 - h. Serum phosphorus.
 - i. Lactic dehydrogenase (LDH).
 - j. Creatine phosphokinase (CPK).

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- k. Serum glutamic-oxaloacetic transaminase (SGOT).
 - l. Serum glutamic-pyruvic transaminase (SGPT).
 - m. Urinalysis, including test hematuria, glucosuria, proteinuria, ketonuria, and microscopic examination of urine.
 - n. Zinc protoporphyrin test.
 - o. Erythrocyte and plasma cholinesterase assays.
 - p. Metabolites found in urine when a specific exposure is identified or postulated.
 - q. Metabolites found in blood when a specific exposure is identified or postulated.
 - r. Radiologists' interpretations of employee x-rays.
 - s. Erythrocyte sedimentation rate.
 - t. Platelet count.
 - u. Serum bilirubin.
 - v. Urine and sputum cytology reports.
 - w. Serum triglycerides.
 - x. Serum cholesterol.
5. Qualified Compliance Personnel. Review of the results of any medical tests named in (d) of this section are in personally identifiable form shall be limited to:
- a. Program field-Qualified Industrial Hygienists; or
 - b. Professional with specific training or experience in medical disciplines, if approved by the Secretary.
6. Compliance Procedures.
- a. Before obtaining access to the medical information described in M.4. of this section, it must be determined by the Director of Compliance that there is a genuine and supportable need to gain access for Program enforcement purposes.
 - (1) Review of the medical information named in M.4. of this section could be relevant to the type of enforcement action the Program may initiate against an employer or could serve as evidence of the appropriateness of an enforcement

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action. The following considerations are among those which could indicate the need to gain access to personally identifiable employee medical information:

- (a) To document employer knowledge by establishing that the records show a pattern of disease.
- (b) To provide evidence that the employer willfully violated a KY OSH standard.
- (c) To provide supporting evidence that a "general duty clause" violation occurred.
- (d) To document inadequate management of employees found to have evidence of adverse health effects. For example, to document that workers were not adequately notified of abnormal laboratory values or that appropriate follow-up protective measures were not taken.
- (e) To verify compliance during follow-up inspections.

(2) A determination must also be made that:

- (a) An employee is subjected to a toxic substance or harmful physical agent in the course of employment through any route of entry (e.g., inhalation, ingestion, skin contact, or absorption, etc.). This determination of the employee's exposure includes both past or potential exposure.
- (b) The laboratory test is a recognized indicator of this employee's past and/or potential exposure to a toxic substance or harmful physical agent, or recognized indicator of an adverse health effect of such an exposure. This can be derived from a variety of sources, including recognized textbooks in the field of industrial hygiene, medicine and toxicology, federal publications, and technical journals.

(3). This section does not authorize the compliance officer to examine records for the purpose of identifying trends of illnesses which are not

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directly related to the recognized adverse effects of specific substances of agents. Thus, the compliance officer is not to do investigative research or conduct a wholesale investigation of medical records to identify possible violations.

- b. Access to medical information named in M.4. of this section shall, if practicable, involve on-site review. A minimum of personally identifiable information shall be recorded for enforcement purposes and taken off-site.
- c. Compliance personnel shall use, if available, the normal ranges for the laboratory conducting the test, or normal values established in accepted medical texts.
- d. When an abnormality is identified, the compliance officer shall investigate the abnormality through one or more of the following mechanisms:

- (1) Consult with the examining physician or health care personnel in charge of or who has access to employee medical records. If based on this consultation, the compliance office determines that no further investigation is necessary, documentation shall be made in the files of:

- (a) Whose records and which tests were examined;
- (b) The rationale for examining those tests;
- (c) All abnormalities found (without personally identifiable information); and
- (d) What procedures were followed.

NOTE: Personally identifiable information shall be removed from all other notes concerning these test results once a decision has been made that no further action is necessary.

- (2) If the procedure described in 6. above was not followed, or it was followed but no satisfactory response was given the Director shall contact the Secretary's office, and the Secretary in turn shall obtain the services of a medical consultant.

- e. Notifying Employees of Abnormal Results.

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- (1) When abnormalities have been satisfactorily explained by the employee's physician, the compliance officer shall investigate whether the physician notified the employee of the results.
 - (2) When the services of a contract physician have been used, the compliance officer shall ensure that the physician notifies the employee of any abnormalities found.
- f. Program compliance officers have the responsibility to maintain the confidentiality of all medical information and records.
- (1) The compliance officer shall not discuss any of the information found in the records which is or could be identified with specific individuals, with any employer or employee representatives, except the physician or health care personnel in charge of or who has access to employee medical records. This restriction applies even in situations where such medical information may be known to those (or other) individuals.
 - (2) However, the compliance officer is authorized to reveal the following information to an employee whose medical record has been looked at:
 - (a) The laboratory test examined;
 - (b) The rationale for examining that test;
 - (c) The normal ranges used and where these ranges were derived;
 - (d) The numerical test result if known by the compliance officer.

NOTE:

- (a) Under no circumstances should the compliance officer attempt any further discussion with the employee of the meaning of the results, conclusions, interpretations, diagnoses, etc. These judgements can only be made in view of the total medical record and only by an examining physician. If the employee wants clarification, he/she shall be referred to a physician for any discussion or test results.

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- (b) The compliance officer shall not re-examine the medical records solely to inform an employee of his/her test results.
- g. Security Procedures. Whenever personally identifiable employee medical information is obtained pursuant to this section and taken off-site, the Director shall:
 - (1) Promptly name a principal Program Investigator to assure protection of this information.
 - (2) Assure that the personally identifiable medical information obtained shall therefore be subject to the use and security requirements of this chapter.
- h. Access to this medical information for purposes other than for the limited enforcement needs illustrated in 6. of this section will require a written access order (see paragraph B. of this chapter) unless:
 - (1) Specific written consent of an employee is obtained pursuant to 29 CFR 1910.20(e)(2)(ii), and the agency or an agency employee is listed on the authorization as the designated representative to receive the medical information.
 - (2) An OSH staff or contract physician consults with an employer's physician pursuant to paragraph B.4.b. of this chapter.

7. Citations.

- a. If abnormalities have been detected and the employee has not been notified, the Director should consult with the Commissioner of Workplace Standards before issuing a citation.
- b. Documentation to support a citation [see paragraph 6.a.(1) of this section] shall include personally identifiable information. However, this information shall not be disclosed on the citation.

O. Authorization and Procedures for Reviewing Specific Medical Records to Verify Compliance with 803 KAR 2:180.

1. Background.

- a. Throughout the FOM, emphasis has been placed on the necessity of examining all applicable employer injury and illness records during every inspection to verify

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compliance with recordkeeping requirements of 803 KAR 2:180. These records, which are often in the form of employee medical records, must be compared with the OSHA-200 log entries to investigate potential under-reporting.

- b. "Employee medical record" is defined at 29 CFR 1910.20(c)(6)(1) as a record concerning the health status of an employee which is made or maintained by a physician, nurse, or other health care personnel, or technician, including:
- (1) Medical and employment questionnaires or histories (including job description and occupational exposures);
 - (2) The results of medical examinations (preemployment, preassignment, periodic, or episodic) and laboratory tests (including x-ray examinations and all biological monitoring);
 - (3) Medical opinions, diagnoses, progress notes and recommendations;
 - (4) First-aid records;
 - (5) Descriptions of treatments and prescriptions; and
 - (6) Employee medical complaints.
- c. This chapter specifies the rules governing OSH Program access to personally identifiable employee medical information contained in medical records. Excluded from coverage by these rules, however, are certain records that are of such occupational safety and health importance that are so frequently used by various agency personnel that rigid approval and security procedures would be both impractical and inappropriate.
- d. Paragraph A.2.c. of this chapter states that "...This section does not apply to records required by 803 KAR 2:180..." The agency interprets this to mean that the Program does not need an access order or written employee consent to obtain access to the following employer-maintained records:
- (1) OSHA-200;
 - (2) OSHA-101 or equivalent; and
 - (3) Any backup information (e.g., first-aid logs, first report of injury) no more detailed than

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the type of information contained in the OSHA-101.

- e. Certain backup medical records (e.g., some first reports of injury) that may be necessary to verify compliance with 803 KAR 2:180 recordkeeping requirements contain information more detailed than that required by the OSHA-101, such as written medical opinions, progress notes, prescriptions, and recommendations.
 - f. Paragraph A.2.f. of this chapter excludes from the rules governing Program Records access situations "where a written directive by the Commissioner authorizes appropriately qualified personnel to conduct limited reviews of specific medical information mandated by an occupational safety and health standard, or of specific biological monitoring test results." Therefore, this section, pursuant to that provision, establishes procedures allowing direct KY-OSH Program access to additional type of medical records when necessary for the sole purpose of verifying compliance with 803 KAR 2:180.
2. Statutory Purpose and Need to Gain Access. The purpose of obtaining access to the medical information specified at I.2. is to ensure safe and healthful working conditions for working men and women by providing an effective enforcement program for KY-OSH standards and the Occupational Safety and Health Law.
- a. To accomplish this purpose it may be necessary for agency personnel to examine the employee medical information specified at 4.b. to determine compliance with the recordkeeping requirements of 803 KAR 2:180, regulations and procedures on recording and reporting occupational injuries and illnesses.
 - b. It may further be necessary for appropriately qualified agency personnel to examine this medical information in a personally identifiable form to enable the agency to determine if all workplace injuries involving more than first-aid treatment are properly recorded on the OSHA Forms 200 and 101, or equivalents.
 - c. If a review of the medical information indicates that injuries and/or illnesses are occurring that are not being recorded, the OSH Program will investigate closely to determine the propriety of the employer's decision not to record them. Personally identifiable information is, therefore, necessary to specify which records are to be examined and enable a complete investigation of all relevant information.

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3. Qualified OSHA Personnel. Review of the medical information described at 4.b. shall be limited to:
 - a. Experienced safety or health compliance officers who are well-versed in the OSHA/Bureau of Labor Statistics recordability guidelines for the OSHA-200; or
 - b. Professionals with specific training or experience in reviewing the types of medical information necessary to verify compliance with 803 KAR 2:180 recordkeeping requirements, if approved by the Director of Compliance.
4. Authorized Medical Information.
 - a. This section authorizes qualified KY-OSH personnel to examine the content of and, if appropriate, copy employee medical records that:
 - (1) Are necessary to verify compliance with 803 KAR 2:180 recordkeeping requirements; and
 - (2) Contain more detailed information than that found in records specifically accessible to KY-OSH pursuant to 803 KAR 2:180 (e.g., the OSHA-101).
 - b. The types of medical information so authorized to be accessible, if not already accessible under 1.d. are:
 - (1) Daily reports of new injury or illness cases;
 - (2) State workers' compensation forms (independent of OSHA-200 and -101);
 - (3) First-aid records;
 - (4) Nurse/physician/clinic logs;
 - (5). Company accident reports; insurers' accident reports; and
 - (6) Sanitized medical records available to employer officials outside the medical office.
 - c. This authorization is contingent upon adherence to the guidelines described in paragraph 5. below of this section.
 - d. The information revealed through review of the records authorized in this instruction can then be used to document or support violations other than 803 KAR 2:180.

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- e. This instruction is not intended to limit KY-OSH program access to information authorized elsewhere by regulation or directive.
- (1) Authorization procedures for access to biological monitoring results that involve the evaluation or physiological status of a body system are described in paragraph M. of this chapter.
 - (2) Authorization procedures for access to medical opinions mandated by existing standards are described in paragraph L. of this chapter.
 - (3) Biological monitoring results which directly assess the absorption of a substance or agent by body systems are exposure records--not medical records. As such, Compliance personnel also are permitted access (for compliance purposes) to biological monitoring results which directly assess the absorption of a substance or agent by body systems. These results are treated by 29 CFR 1910.20(c)(5)(ii) as exposure records. Examples are:
 - (a) Blood lead levels;
 - (b) Urine Mercury;
 - (c) Urine phenols;
 - (d) Urine monoacetylbenzidine;
 - (e) Exhaled carbon monoxide;
 - (f) Hair assays;
 - (g) Fingernail assays; and
 - (h) Carboxyhemoglobin.
- f. Access to information other than that specified in 4.b. and 4.c. above, will require a written access order following the procedures in paragraph B.1. of this chapter unless:
- (1) Specific written consent of an employee is obtained pursuant to 29 CFR 1910.20(e)(2)(ii)(B) and the agency or an agency employee is listed on the authorization as the designated representative to receive the medical information.
 - (2) A KY- OSH staff or contract physician consults

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with an employer's physician pursuant to paragraph B.4.b. of this chapter.

- (3) KY-OSH Program access to, or the use of, personally identifiable employee medical information is obtained in the course of litigation.

5. Guidelines for Screening Authorized Medical Information. Access to medical information described at 4. (hereinafter referred to as "authorized backup records") shall be restricted to situations where qualified OSH personnel have determined that a review of such records is necessary to verify compliance with 803 KAR 2:180 recordkeeping requirements. Moreover, where such review has been deemed necessary, it shall be confined to only that extent needed to access 803 KAR 2:180 compliance.

- a. Limit Removal of Records. Access to authorized backup records shall, if practicable, involve on-site review. If possible, remove direct personal identifiers from the medical information on-site and code the medical information and the list of direct identifiers with a unique identifying number for each employee. [See 29 CFR 1910.20(g).] A minimum of personally identifiable information shall be recorded for enforcement purposes and taken off-site.

- b. Limit Review of More Sensitive Records. Records reviewed to assess 803 KAR 2:180 compliance shall be screened in reverse order of sensitivity (the least sensitive first) to determine needs for further review. The order of review is normally thus:

- (1) OSHA-200, OSHA-101 or equivalent.
- (2) State worker's compensation forms (independent of OSHA-200 and -101).
- (3) First-aid records, first report of injury, nurse /doctor/clinic logs, company accident reports, and insurers' accident reports, whose information is no more detailed than that of the OSHA-101 or equivalent.
- (4) Any further backup sanitized medical information describing injuries and illnesses resulting from workplace accidents available to employer officials outside the medical office.
- (5) Supporting records specified in 5.b.(3) that also contain more detailed medical information, such as medical opinions, progress notes, prescriptions, and recommendations.

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- c. Limit Access to Employee Medical File. Personally identifiable employee medical information shall normally be confined to:

- (1) Employee name.
- (2) Nature and location of record.
- (3) Nature of observed recordkeeping deficiency.
- (4) Evidentiary relationship of record to observe recordkeeping deficiency.

NOTE: Personally identifiable information shall not be disclosed on the citation.

6. Security and Confidentiality. Where access to employee medical information is obtained pursuant to the authorization of this instruction, the Area Director or a qualified person designated by the Area Director shall be responsible for ensuring its security and confidentiality.

- a. Agency Use. Employee medical information in personally identifiable form shall be used and kept secured in accordance with paragraph G. of this chapter.

- b. Retention of Identifiers. If clearance is obtained from the Commissioner of Workplace Standards, direct personal identifiers may be kept together with the authorized backup records to which access has been obtained pursuant to this instruction, as long as the instant investigation and/or subsequent litigation is ongoing. Upon completion of the instant investigation and/or subsequent litigation, the personal identifiers shall either be removed and retained separately, or all records shall be returned to their sources or destroyed consistent with Kentucky records disposition programs.

- c. Segregation. Agency files containing personally identifiable employee medical information obtained pursuant to this chapter shall be kept segregated from other agency files. When not in active use, files containing the information shall be kept secured in a locked cabinet or vault.

- d. Security. The security procedures set forth at paragraph G. of this chapter shall be followed.

- e. Interagency Transfer and Public Disclosure. Personally identifiable employee medical information obtained pursuant to this chapter shall not be

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transferred to another agency or office outside the OSH Program other than to the Office of the General Counsel, or to the Bureau of Labor Statistics when necessary to determine compliance with 803 KAR 2:180 or disclosed to the public except when required by law or approved by the Commissioner of Workplace Standards.

7. Technical Assistance and Training. Technical assistance and/or training can be provided by the Division of Education and Training. It shall be sought, where determined necessary.
8. When Access is Denied. If access to medical records, as authorized by this chapter is denied, an administrative subpoena shall be issued, if determined appropriate by the Director of Compliance. In addition, the Commissioner of Workplace Standards shall be consulted as to the appropriateness of also issuing a medical access order.

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